

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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May 26, 2011

Assistant Secretary, Drug Strategy Branch
Attention: Tobacco Reform Section
Department of Health and Ageing
GPO Box 9848
Canberra, ACT 2606

Dear Assistant Secretary:

The U.S. Chamber of Commerce (the U.S. Chamber) submits this letter in response to the March 11, 2011, Department of Health and Ageing request for comments on the *exposure draft Tobacco Plain Packaging Bill 2011* (the Bill) and *Consultation Paper* which includes the proposals for plain packaging design. The U.S. Chamber is a strong supporter of measures to protect public health and recognizes the importance of reducing smoking rates in those efforts. However, we believe that the proposed plain packaging requirements in the Bill are not supportive of those public health goals, are a departure from the Australian Government's international trade and intellectual property (IP) commitments, and set a dangerous precedent at the expense of the protection of IP rights for a number of industries.

The U.S. Chamber is the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region. Of significant importance to our members is the protection of IP rights, which are essential to the ability of businesses to compete and thrive in the global economy. While well-intentioned, we believe Australia's proposed plain packaging requirements would significantly undermine the value of trademark protections by depriving brand owners of the ability to use their mark in commerce. The result of such actions could be loss of investment and jobs in the Australian economy.

Plain Packaging Destroys the Value of Trademarks without Advancing Public Health Objectives

Trademarks protect the reputation of companies and their products and prevent consumer confusion and deception. For many of our members, the brand

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itself, the reputation of which they built over years of providing quality goods and services, is the most valuable asset of a company. The protection of trademarks is a priority for the U.S. Chamber. The U.S. Chamber's significant efforts through the Global Intellectual Property Center (GIPC) and the Coalition Against Counterfeiting and Piracy (CACP) are illustrative of our extensive commitment to protect these valuable assets.

While the U.S. Chamber supports the Australian Government's commitment to improving the health of its citizens, there is a lack of science-based evidence which indicates that plain packaging will achieve the stated objective of reducing the smoking rate among the population. On the contrary, a plain packaging requirement could promote an influx of low priced generic and possibly counterfeit products. On this latter point, there is analysis and research by highly respected organizations, such as Deloitte, that explain an already serious and growing problem in Australia with illicit commerce.

Studies have shown that consumption of tobacco products increases when prices are lowered; mandating plain packaging, essentially making price the only means of competition, could lead to lower prices and increased availability and consumption. An increase in counterfeit tobacco products creates additional health and safety concerns including the possible consumption of un-regulated products containing dangerous contaminants. Additionally, purveyors of counterfeit products typically have links to organized crime and street gangs who, in addition to their illegal undertakings, do not provide tax revenue to the government on sales of counterfeit products.

Therefore, we believe that the lack of distinguishing trade dress and labeling may ultimately result in an increased risk of consumer deception and confusion; may paradoxically result in unintended harm to public health; and would deny the property rights of companies and their workers who have invested in building their brand's reputation.

Plain Packaging Is Inconsistent with Australia's International Obligations

The proposed plain packaging requirements would likely be inconsistent with Australia's international obligations, including those highlighted below under the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the Paris Convention of Industrial

Property (Paris Convention), and the WTO Agreement on Technical Barriers to Trade (TBT). Among the provisions:

- **Article 20 of the TRIPS Agreement states:** “[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as... use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.” The proposed plain packaging requirement allowing manufacturers only to “print brand and product names” would eliminate the use of most trademarks, which are a critical means for consumers to distinguish among products. Consequently, by eliminating the trademark on the package, the Bill places encumbrances by special requirements that are inconsistent with TRIPS Article 20
- **The “limited exceptions” under Article 17 of the TRIPS Agreement are not satisfied** by the Bill. TRIPS Article 17 allows WTO Members to provide for limited exceptions to trademark rights “provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.” Such exceptions do not apply in this case for several reasons. For example, the prohibition on use of the cigarette trademarks (apart from the name in plain type) is not “limited” but is instead a near-complete abrogation of the trademarks. In addition, the proposed Bill does not “take account of the legitimate interests” of trademark owners to differentiate their products, nor does it take account of the rights of third parties, especially consumers, in understanding the nature of the product they are purchasing.
- **Article 10bis of the Paris Convention** prohibits “all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor.” Requirements under the Bill would remove all distinctive elements of tobacco packaging with the exception of the brand name in a uniform font style and font size presented on a dark olive brown matt finish background. As a result, there is a very substantial risk that there will be confusion in the retail setting as to the brand of tobacco product consumers are purchasing.
- **Article 2.2 of the TBT Agreement** requires that “technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create.” While protection of

public health is clearly a legitimate objective, the U.S. Chamber is concerned that the plain packaging requirements, particularly in the absence of credible science-based evidence that these requirements would address public health concerns, might actually have the opposite effect and that there are less trade-restrictive measures that could be employed to achieve the stated objectives, as Australia itself has recognized in TBT cases on packaging.

Conclusion

While the U.S. Chamber is supportive of the Bill's stated health objectives, we are deeply concerned about the approach taken in the Bill and the unintended consequences it may create. Those consequences include the dangers of increased smoking rates due to competition through pricing in the legal market and an influx of illicit and counterfeit tobacco products facilitated by the regulatory structure in the Bill. The accelerated growth in illegal tobacco sales and the adverse consequences associated with these markets should be a serious consideration when considering the provisions of the Bill.

We are also concerned that the Bill potentially violates numerous Australian international commitments and has the potential to undermine trademark and other intellectual property rights ultimately resulting in consumer confusion. The consequences for manufacturers, raw material suppliers, and distributors could be severe in terms of lost revenues, lost jobs, and long-term damage to critically important brands. The impact on Australia's economy could also be significant if Australia loses its reputation for strong intellectual property protection through the improper expropriation of registered marks.

Accordingly, we request that Australia consider alternatives that would be equally or more effective in terms of protecting public health but which would not undermine the international system for protecting trademarks.

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We appreciate the opportunity to provide our views on the draft Bill.

Sincerely,



Myron Brilliant
Senior Vice President/International Affairs
U.S. Chamber of Commerce

cc: The Honorable Dr. Craig Emerson, MP, Minister for Trade
Senator the Honorable Kim Carr, Minister for Innovation, Industry, Science and
Research
The Honorable Robert McClelland, MP, Attorney-General
The Honorable Richard Marles, MP, Parliamentary Secretary for Pacific Island
Affairs
The Honorable Julie Bishop, MP, Deputy Leader of the Opposition
The Honorable Peter Dutton, MP, Shadow Minister for Health and Ageing
Senator the Honorable George Brandis SC, Shadow Attorney-General
Mrs. Sophie Mirabella, MP, Shadow Minister for Innovation, Industry and
Science
Senator Fiona Nash, Deputy Leader of the Nationals in the Senate
The Director, International Intellectual Property Section,
Office of Trade Negotiations, Department of Foreign Affairs and Trade
The Honorable Kim Beazley, ambassador to the United States